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HAROLD B. WILL

Supreme Court of the United States

OCTOBER TERM, 1953

No. 303

RAYMOND B. FISHER,
Petitioner

v.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Printed by Law Reporter Printing Co., 518 5th St., Wash., D. C.

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To the Honorable, the Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

Petitioner, Raymond B. Fisher, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit has not yet been reported, but appears in Record, p. 43.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the District of Columbia was entered on April 30, 1953 (R. 46). Petition for Rehearing (R. 47) was denied July 30, 1953 (R. 53). The jurisdiction of this Court is invoked under Section 1254 of Title 28, U. S. Code.

QUESTIONS PRESENTED

I. Whether police officers having information for more than a week from an alleged reliable informant that gaming was being conducted at certain premises could legally enter the residential portion of such premises without authority of a warrant and make searches and seizures, and thereafter legally make arrests as a result of what said searches and seizures disclosed.

II. Whether under the circumstances referred to in Question I, where no reasons were offered for the non-procurement or attempted procurement of a search warrant by police officers, either prior to making the search or when they saw what was transpiring in the place searched, the evidence so obtained should not have been suppressed and the seized property returned when a motion therefor was seasonably made.

III. Whether under the circumstances referred to in the foregoing questions, the police officers had authority, without any warrant, even to enter the shop solely for the purpose of conducting a raid, in which shop they had no intention of transacting any business connected therewith.

IV. Whether, pretermitting the legality of the searches, seizures, and arrests referred to in Question I and II, it was legal to find appellant guilty when no evidence was offered that the seized articles were items used in conduct of a "lottery" or were "lottery slips" within the proscription of the statutes.

STATUTES INVOLVED

The Statutes (Sec. 22-1501, 1502, D.C. Code, 1940 Ed.) which petitioner has been convicted of violating read as follows:

Section 22-1501:

> "If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other devise, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than $1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery. (Mar. 3, 1901, 31 Stat. 1330, ch. 854, sec. 863; June 30, 1902, 32 Stat. 535, ch. 1329; Apr. 5, 1938, 52 Stat. 198, ch. 72, sec. 1.)"

Section 22-1502:

> "If any person shall within the District have in his possession, knowingly, any ticket, certificate, bill, slip, token, paper, writing, or other device used, or to be

used, or adapted, devised, or designed for the purpose of playing, carrying on, or conducting any lottery, or the game or device commonly known as policy lottery or policy, he shall be fined upon conviction of each said offense not more than $500 or be imprisoned for not more than six months, or both. (Apr. 5, 1938, 52 Stat. 198, ch. 72, Sec. 2.)"

STATEMENT OF THE CASE

Petitioner was indicted jointly with Joe Battle, Roy O. Brooks, and James G. Faulkner on April 30, 1951, in a two-count indictment alleging violations of Sections 22-1501 and 1502 of the D.C. Code (1940 Ed.) (R. 38-39).

The first count alleged that the four defendants on or about February 16, 1951, within the District of Columbia, were concerned as owners, agents, and clerks, and in other ways, in managing, carrying on, and promoting a lottery known as the numbers game.

The second count alleged that the four defendants on or about February 16, 1951, within the District of Columbia, knowingly had in their possession certain tickets, certificates, bills, slips, tokens, papers, and writings used and to be used and adapted, devised, and designed for the purpose of playing, carrying on, and promoting a lottery known as the numbers game. They were arraigned and entered pleas of not guilty to the indictment.

Police officers of the Metropolitan Police Department entered premises of petitioner on February 16, 1951, without authority of a search warrant or warrant of arrest, because they were suspicious that said premises were a gaming establishment (R. 31) and "raided" same. They walked through a store of petitioner's which was about 25 feet long and into a room in back of the store, which was part of the residence of petitioner, wherein they made searches, seizures, and arrests. The said officers searched said residential part of premises of petitioner and the persons of approximately eleven people without their consent,

seized certain property from petitioner, and then placed petitioner and two of the other defendants under arrest, except the defendant Battle who had not yet arrived in said premises. Some time later the defendant Battle arrived in the premises, was immediately seized and searched by the same officers without his consent, certain of his property was seized by them, and he was thereafter placed under arrest.

Two motions for the return of seized property and the suppression of evidence (R. 39-40) were seasonably filed. A stipulation between the United States and petitioner Fisher was also filed in this cause (R. 40-41). After considering the testimony of the police officers and the stipulation of the parties hereto, the Court, Judge McGuire presiding, overruled both motions (R. 14).

The trial of petitioner and the other three defendants indicted with him was commenced before the District Court without a jury on October 22, 1951, Judge Curran presiding. Defendants renewed their motions to suppress the evidence at the beginning of the trial. Further objections were seasonably made to the evidence of the arrests, searches, and seizures because they violated the constitutional rights of defendants. The trial judge considered said motions to suppress the evidence hereinbefore referred to and the oral objections to the admission of the evidence, and at the conclusion of all the testimony excluded the evidence seized from the defendant Battle, and deferred his verdict as to the admissibility of the evidence seized from appellant and others until briefs were submitted by counsel for both sides.

After submission of briefs by counsel, the trial judge overruled objection of petitioner, and admitted the evidence seized from petitioner and the other defendants. The judge then found the petitioner and Faulkner guilty on both counts of the indictment on January 25, 1952. The defend-

ants Battle and Brooks were found not guilty. Petitioner was sentenced on March 14, 1952, to from six to eighteen months on the indictment.

To prove its case the prosecution called two officers of the Metropolitan Police Department who testified regarding the searches, seizures, and arrests; and counsel for the government and petitioner entered into a stipulation hereinbefore referred to which is part of the record.

Sergeant Bonaccorsi, one of these officers, testified that he was assigned to the Vice Squad and went to the premises of the petitioner on February 16, 1951, acompanied by other police officers; that he and the officers who assisted in the searches, seizures, and arrests had never been in the premises searched and went to said premises for the purpose of investigating a complaint of gambling; that they did not have a search warrant or a warrant of arrest for anyone in said premises; that prior to the above date he had information regarding the premises but not regarding any particular individual therein; that he had such information approximately a week or so prior to Feb. 16, 1951, but would not divulge the name of the informant, and that such information was reliable and to the effect that said premises were used for gambling purposes; that he did not present, nor was the informer ever presented to the United States Commissioner or to any Court for the purpose of attempting to secure a search warrant or warrant of arrest for either the premises searched or any of the people who might be therein.

That he entered the premises about 1:45 p.m. February 16, 1951, and that the first room entered was a shoe shine parlor and valet shop about 25 or 30 feet long, with a long counter on one side and a shoe shine stand on the other; that he and the other officers proceeded through the valet shop and walked into part of the residence of the appellant, in which room the searches, seizures, and arrests (except Battle) were made; that he was not invited into the

valet shop nor the room searched by anyone; that prior to entering the room searched he could see the defendant and several other people; that he went into said premises to see if there was any gambling going on; that after getting into the room he examined certain articles on two tables, and after said examination he determined that such was gambling paraphernalia; that they placed everyone in the room under arrest, but released all except three, who were made defendants.

That the officers did not even enter the business part of the establishment to conduct any business involving the valet shop; that as he walked into the premises, neither he nor any of the other officers made any attempt to apply for a search warrant or warrant of arrest; that none of the officers were responding to an emergency; that none of the people in the room searched attempted to escape nor did the persons in said room attempt to destroy anything therein; *the officer reiterated that he could not tell what the papers and things seized were until he picked them up and examined them, after which he placed the petitioner and others under arrest.* He further reiterated that the reason he went to the premises was to see if there was an operation of a lottery going on.

Officer Wallace Valentine, another of the police officers, testified that he went to the premises with Sergeant Bonaccorsi to "raid" the premises and because the police officers were suspicious that said premises were used as a gambling establishment; that some time after the police officers had walked in, and subsequent to the search of the room in back of the valet shop, he, Valentine stood in the valet shop and arrested Battle when Battle entered same; that he did not know Battle nor had he ever seen him before; that he never made any attempt to take the alleged informer to a United States Commissioner or Court for the purpose of attempting to secure a search warrant or warrant of arrest.

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The stipulation entered into by counsel states in substance that on February 16, 1951, the officers made a search of premises of petitioner; that the officers walked through his store which was part of the premises and entered a room adjoining said store without his consent, which room was part of his living quarters; that it was not possible for anyone to see any evidence of gaming in said room unless and until an entry was made to said room which adjoined the valet shop; that he did not give the officers permission to enter the room, nor did they ask permission to do so; that the seizures made by the officers were on the tables in said room which could not be seen from the entrance, but which could only be seen by the officers after they entered the room searched.

No evidence was offered that the seized articles which were admitted in evidence against petitioner represented certain tickets, certificates, bills, slips, tokens, papers, and writings used and to be used and adapted, devised, and designed for the purpose of playing, carrying on, and conducting a lottery.

REASONS FOR GRANTING THE WRIT

A. The decision of the Circuit Court of Appeals fails to give proper effect to applicable decisions of this Court, and is in conflict with its own and other Circuit courts of appeals decisions; and involves questions of substance relating to the construction and application of the United States Constitution, in that the said decision holds in effect that police officers having information for more than a week from an alleged reliable informant that gambling was being conducted at certain premises could legally enter the residential portion of such premises without authority of a warrant and make searches and seizures; and thereafter legally make arrests as a result of what said searches and seizures disclosed; and further holding in effect that said searches and seizures were lawful, although no reasons were offered

for the non-procurement or attempted procurement of a warrant, either prior to making the search or when the officers saw what was transpiring in the place searched, even though the persons in the premises were not seeking to escape nor was the property seized in the process of destruction, and the officers were on the scene to apprehend said persons if they tried to leave; and further holding in effect that police officers had authority, without any warrant, to enter a shop solely for the purpose of conducting a raid and in which shop they had no intention of transacting any business connected therewith; and in holding that the articles seized under the foregoing circumstances were properly admitted in evidence, although motions for the return and suppression of said seized articles were seasonably made.

B. The decision of the Circuit court is erroneous in failing to reverse the judgment of the trial court when no evidence was offered that the seized articles were items used in the conduct of a "lottery" or were "lottery slips" within the proscription of the statutes.

a. The motion to return property and to suppress the evidence seized should have been sustained, and the property and things seized should not have been admitted in evidence against petitioner.

It is obvious from the testimony of the police officers that they entered the premises in reality for the purpose of conducting a general, exploratory search for merely evidentiary materials tending to connect the petitioner with some crime. It is further obvious that the arrest of petitioner was incident to the seizure and not the seizure to the arrest. This practice has been condemned on numerous occasions by this Court. *Trupiano* v. *U. S.*, 334 U. S. 699, 707-708; see also *McKnight* v. *U. S.* (C.A.D.C.) 183 F. (2d) 977.

There can be no question from the testimony that the conduct of the officers entering the premises of petitioner

—even the valet shop—was for the purpose of searching and seizing, and in case of discovery of property which the officers might conclude to be incriminating evidence, then to arrest and charge the petitioner with what the illegal search and seizure might disclose. Officer Valentine stated that the officers "raided" the premises because they were suspicious that the premises were a gambling joint; (R. 31) and further, that the officers went into said premises because of information given to them by an unidentified informer. The other police officer, Sergeant Bonaccorsi, testified that he went to the premises for the purpose of investigating a gambling complaint and to see if there was any gambling going on (R. 3, 21, 23). He testified further that the petitioner and others were not placed under arrest until he had made a search and an examination of the things seized, and he determined after such examination that they were evidence of gambling (R. 6, 27). It is obvious that this was not a search without warrant incident to a lawful arrest because such search, to be legal, is dependent initially on a valid arrest. *U. S.* v. *Rabinowitz*, 339 U. S. 57.

No reason was offered in this case for not obtaining a search warrant. No reason was given for not taking the alleged informer, whom the officers described as reliable, to a magistrate for the purpose of securing or attempting to secure a search warrant or a warrant of arrest. The search and seizure in this case was not incident to a lawful arrest and cannot be justified on that basis. Further, there was no compelling reason to justify the absence of a search warrant before entering the premises.

Sergeant Bonaccorsi further testified that he had never been in the premises searched prior thereto (R. 3). A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; nor can it be tolerated under the constitutional system that evidence of crime discovered by an officer in making a search without lawful warrant may be used against the victim of unlawful search

where a challenge has been interposed. *Byars* v. *U. S.*, 273 U. S. 28. *Weeks* v. *U. S.*, 232 U. S. 383; *Gouled* v. *U. S.*, 255 U. S. 298; *Amos* v. *U. S.*, 255 U. S. 313; *Silverthorne Lumber Company* v. *U. S.*, 251 U. S. 385; *Agnello* v. *U. S.*, 269 U. S. 20.

In this case, as in the case of *D. C.* v. *Little*, 85 U. S. App. D. C. 242, the Government lays great stress upon the fact that there was a complaint. As was stated by the Circuit Court in that case:

> "The District lays great stress upon the fact that there was a complaint, succint and definite. But so far as we know, the existence of a complaint has never been held to be a basis for dispensing with a search warrant. Quite the contrary, the fact of a complaint shows (1) that there is an identifiable informant who could be taken before a magistrate; (2) that the enforcement officers have no direct or personal knowledge of the alleged offense; and (3) that in all reasonable probability, a search warrant would be procurable. *These are reasons for getting a warrant, not for failing to get one.*" (Emphasis supplied.)

The case of *Henderson* v. *U. S.*, 4 Cir. 12 F. (2d) 528, 531, 51 ALR 420, quoted in *McKnight* v. *U. S.*, *supra*, states that it is settled law on this proposition that:

> "When it appears, as it does here, that the search and not the arrest was the real object of the officers in entering upon the premises, and that the arrest was a pretext for or at most, an incident of the search"

the search is not reason within the meaning of the Constitution.

An arrest may not be used as a pretext to search for evidence; see *U. S.* v. *Lefkowitz*, 285 U. S. 452, 467. Attention is directed to *Byars* v. *U. S.*, *supra*, in which the Supreme Court said:

> "The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and

seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, *is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right.* (Emphasis supplied.)

Attention is also called to *Boyd* v. *U. S.*, 116 U. S. 616, 635, in which the Court said:

". . . illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and deviations from legal modes of procedure. *This can only be obviated by adhering to the rule that constitutional provisions for the security of a person and property should be liberally construed. A close and literal construction deprives them of half of their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.*" *Gouled* v. *U. S., supra; Marron* v. *U. S.*, 275 U. S., 192; *U. S.* v. *Lefkowitz, supra; Sgro* v. *U. S.*, 287 U. S. 210. (Emphasis supplied.)

The record in this case shows conclusively that the search and seizure were made in the residential part of the premises of petitioner (R. 40, 41). This is shown by the uncontroverted stipulation in the case, and is to a great extent corroborated by the testimony of the police officers. It has always been in the law in the Federal courts that even if probable cause is shown, a search of a dwelling house may not lawfully be made without a warrant. In this connection, attention is called to the leading case of *Agnello* v. *U. S., supra,* in which this Court stated the following on Page 33:

"Safeguards similar to the Fourth Amendment are deemed necessary and have been provided in the con-

stitution or laws of every state of the Union. We think there is no state statute authorizing the search of a house without a warrant; and, in a number of state laws recently enacted for the enforcement of prohibition in respect of intoxicating liquors, there are provisions similar to those in Section 25 of the National Prohibition Act. *Save in certain cases as incident to arrest, there is no sanction in the decisions of the courts, Federal or state, for the search of a private dwelling house without a warrant.* Absence of any judicial approval is persuasive authority that it is unlawful. See *Entick* v. *Carrington*, 19 How St. Tr. 1030, 1066. Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause." (And cases cited thereunder.) (Emphasis supplied.)

This case also falls squarely within the case of *McDonald* v. *United States*, 335 U. S. 451. As stated therein:

"This guaranty of protection against unreasonable searches and seizures extends to the innocent and guilty alike. It marks the right of privacy as one of the unique values of our civilization, and, with few exceptions, stays the hands of the police unless they have a search warrant issued by a magistrate on probable cause, supported by oath or affirmation. And the law provides as a sanction against the flouting of a constitutional safeguard and suppression of evidence secured as a result of this violation, when it is tendered in a Federal Court. *Weeks* v. *U. S.*, 232 U. S. 383."

This Court further stated:

"The prosecution seeks to build the lawfulness of the search on the lawfulness of the arrest and so justify the search and seizure without a warrant. See *Agnello* v. *United States*, 269 U. S. 20, 30; 70 L. Ed. 145, 148; 46 S. Ct. 4; 51 ALR 409; *Harris* v. *United States*, 331 U. S. 145, 150, 151; 91 L. Ed. 1399, 1405; 57 S. Ct. 1098."

This Court further stated in the McDonald case:

"*This is not a case where the officers, passing by on the street, hear a shot and a cry for help and demand entrance in the name of the law.* They had been following MacDonald and keeping him under surveillance for two months at this rooming house. The prosecution now tells us that the police had no probable cause for obtaining a warrant until, shortly before the arrest, they heard the sound of the adding machine coming from the rooming house. And there is vague and general testimony in the record that on previous occasions the officers had sought search warrants but had been denied them. *But those statements alone do not lay the proper foundation for dispensing with a search warrant.* (Emphasis supplied.)

"*Where, as here, officers are not responding to an emergency, there must be compelling reasons to justify the absence of a search warrant.* A search without a warrant demands exceptional circumstances, as we held in *Johnson* v. *United States*, 333 U. S. 10; 92 L ed 436; 68 S Ct 367, *supra*. *We will not assume that where a defendant has been under surveillance for months, no search warrant could be obtained.* What showing these officers made when they applied on the earlier occasions, the dates of these applications and all the circumstances bearing upon the necessity to make this search without a warrant are absent from this record. We cannot allow the constitutional barrier that protects the privacy of the individual to be hurdled so easily. *Moreover, when we move to the scene of the crime, the reason for the absence of a search warrant is even less obvious. When the officers heard the adding machine, and, at the latest when they saw what was transpiring in the room, they certainly had adequate grounds for seeking a search warrant.*" * * * (Emphasis supplied.)

"*The defendant was not fleeing or seeking to escape, Officers were there to apprehend petitioners in case they tried to leave. Nor was the property in the process of destruction nor as likely to be destroyed as the opium paraphernalia in the Johnson Case.* Petitioners

were busily engaged in their lottery venture. *No reason except inconvenience of the officers and delay in preparing papers and getting before a magistrate appears for the failure to seek a search warrant.* But these reasons are no justification for by-passing the constitutional requirement, as we held in *Johnson* v. *United States, supra.* (Emphasis supplied.)

"We are not dealing with formalities. The presence of a search warrant serves a high function. *Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police.* This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose jobs is the detection of crime and the arrest of criminals. *Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.*" (Emphasis supplied.)

It must be remembered that if the arrests or searches or seizures were illegal, the admission in evidence of what was found as a result of the illegal arrest or search or seizure is improper; nor is it material that the search was successful in revealing evidence of an alleged violation of law.

It will be noted that the facts in the McDonald case were to a great extent similar to those in this case, but were much stronger for the prosecution than those herein. To make some comparisons: In the McDonald case, McDonald had previously been arrested for numbers operation and had been under police observation for several months prior to the arrest. *This was a more favorable status for the prose-*

cution than the case at bar, because the officers testified in this case they had never been in the premises, nor did they have any information regarding the alleged occupants of 813 Fourth Street, S.W.

In the McDonald case they did not have a warrant for arrest nor a search warrant. *The same situation existed in the case at Bar.* In the McDonald case they looked into a transom and saw a game in actual operation. In this case, *the strongest that can be said for the testimony of the police officers is that they may have seen some papers just as they were entering the room in the rear of the valet shop; but their testimony is that they had to examine the papers before they could determine that they were gambling slips* (R. 6, 27).

In the McDonald case, this Court said that when the officer saw the game in operation, it was then and there their duty to secure a search warrant. The officers in this case *made no attempt to secure a search warrant or warrant of arrest at the time they entered the room adjoining the valet shop.* In the McDonald case, this Court said that the defendant was not fleeing or seeking to escape, and that officers were there to apprehend petitioners in case they tried to escape. *The same situation existed in this case.* In the McDonald case, this Court said that the property was not in the process of destruction, nor likely to be destroyed because the officers were there to prevent it. *The same situation existed in this case.* In the McDonald case this Court said that it was not a case where the officers passing by on the street, heard a shot and a cry for help and demanded entrance in the name of the law. *The same situation existed in this case.*

Attention is further directed to the proposition that the officers in the case at Bar stated they had reliable information for at least a week regarding alleged gambling transactions occurring in the premises searched; but made no attempt to take their informer to any person authorized to

issue search warrants or warrants of arrest in order to attempt to effect a legal arrest, search, and seizure.

It was said in the concurring opinion of Justice Rutledge in the McDonald case regarding the unlawful search therein described:

> "It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it * * * When an officer undertakes to act as his own magistrate, he should be in a position to justify it by pointing to some real, immediate, and serious consequences if he postponed action to get a warrant."

The McDonald case cites *Johnson* v. *U. S.*, 333 U. S. 10, as further authority for the proposition that arrests, searches, and seizures such as occurred herein are illegal, unlawful, and in violation of the constitutional rights of the petitioner.

Attention is called to this Court's reasoning in the Johnson case which, equally applicable to this case, is as follows:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by an officer engaged in the often competitive enterprise of ferreting out crime. *Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.* Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves

into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent." (Emphasis supplied.)

No reason was offered in this case for not obtaining a search warrant. No reason is given for not taking the alleged informer, whom the officers described as reliable, to a magistrate for the purpose of securing or attempting to secure a search warrant, or warrant of arrest. The search and seizure in this case was not incident to a lawful arrest and cannot be justified on that basis. Indeed, Sergeant Bonaccorsi testified on October 2. "The reason I went there first was to make an investigation to see if there was an operation of a lottery there"; and officer Valentine testified that he was on a "raiding" party.

The was no compelling reason to justify the absence of a search warrant before entering the premises.

As said in the Johnson and McDonald cases, when they saw what was transpiring in the room searched (even if it is admitted they were in the room legally), they could and should have gone to a magistrate to seek a search warrant. The defendants were not fleeing or seeking to escape.

The officers should have secured a search warrant before entering the premises; if they did not, and even if they were in the premises legally, *they were then and there again* charged with the duty of securing a search warrant. Further, it cannot be denied that the arrests were made after the search and seizure showed possible violation of the statute forbidding gaming, and were illegal because they were incident to an unlawful seizure.

The equivocal methods of the officers in "raiding" the residential portion of premises in order to make an exploratory search without authority of lawful warrant, their

failure to attempt to secure a search warrant before entering the premises, although their informer had given them "reliable" information more than a week prior to the search, their failure to secure a search warrant even after they entered the room in the rear of the store, the arrests made by them because of what the search disclosed and incident to such search—all show a flouting of the constitutional safeguard against unlawful searches and seizures.

These officers should not be permitted to act as their own magistrates in violation of the Constitutional requirement that a magistrate pass on the desires of the police before they violate the privacy of the home. The founders wrote into the Constitution their conviction that law enforcement does not require the easy but dangerous way of letting the police determine when search is called for without prior authorization by a magistrate. They have been vindicated in that conviction.

The Fourth Amendment to the Constitution is to be liberally construed, and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted. *Go-Bart Importing Company* v. *United States*, 282 U. S. 343, 357; *Boyd* v. *U. S., supra; Weeks* v. *U. S.*, 232 U. S. 389-392.

A liberal construction of the Fourth Amendment in this case forces the conclusion that the searches and seizures were unreasonable; that the arrest of appellant was incident to the unlawful search and seizure, and not the seizure to the arrest; that the search and seizure and not the arrest was the real object of the officers in entering upon the premises; that the search and seizure without warrant was not incident to a lawful arrest; that the police officers entered the premises in reality for the purpose of conducting a general exploratory search for merely evidentiary materials tending to connect the appellant with some crime; and that the motions to Suppress the Evidence and Return of Property should have been sustained and

the property so illegally seized should not have been admitted in evidence against appellant.

The two district judges who considered these motions failed to adhere to the admonitions enunciated by this Court and the Circuit Court. Judge McGuire, in overruling the motions to suppress the evidence, stated that he did not agree with the Court of Appeals. (R. 14.) Judge Curran, in admitting the seized property over objection, stated that he could not agree with the McDonald case at all (R. 37).

The Circuit Court in its opinion (R. 2) states that the entry by the officers into the public valet and shoeshine shop was legal. The assumption is that this shop was open to the public and therefore anyone could enter. These officers testified that they went to the shop only for the purpose of conducting a gambling investigation and a raid, and not to transact any business connected with the valet shop.

A shopkeeper extends an implied invitation to the public to enter his shop for the purpose of transacting business connected therewith. The public in general has his implied consent to enter his shop for that purpose. It would be stretching the legal fiction of implied consent to the ridiculous to apply it so as to bestow rights which are contrary to reality. A shopkeeper gives no more implied consent to police officers to enter and conduct an exploratory raid than the shopkeeper would give to a robber to enter for the purpose of robbing the shopkeeper.

Quite appropriate in this connection is the admonition of this Court in the case of *U. S.* v. *Lefkowitz,* 285 U. S. 452, 467:

> The protection of the Fourth Amendment "is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right."

Also appropriate is this admonition from *Boyd* v. *U. S.*, 116 U. S. 616, 635:

> "* * * illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of a person and property should be liberally construed. A close and literal construction deprives them of half of their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be more watchful for the constitutional rights of the citizens, and against any stealthy encroachments thereon."

Here, the officers testified that they had the alleged information for about a week, made no effort to and did not appear before a magistrate with their informant to apply for a search warrant, and went to appellant's shop solely for the purpose of conducting a raid. This is clearly what has been described by the Supreme Court as "*equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right.*" (Emphasis supplied.)

It is the contention of appellant that the entry of the police officers into his shop for the purpose of conducting a raid on information, and without any warrant, was illegal, and that the evidence seized by them after said entry, was inadmissible.

b. Pretermitting the illegality of the searches, seizures, and arrests in this case, it is contended that there was no evidence that the seized articles which were admitted in evidence against appellant represented certain tickets, certificates, bills, slips, tokens, papers, and writings used and to be used and adapted, devised, and designed for the purpose of playing, carrying on, and conducting a lottery, as proscribed by the statutes.

Although some of the seized articles were referred to in testimony offered by the prosecution as "numbers slips," no evidence was offered to explain how these articles were within the proscription of the statutes prohibiting lotteries. See *Fletcher* v. *U. S.* (D.C. Mun. App.) 49 A. (2d) 88.

Certainly, the nature of the seized articles with reference to a lottery is not within the realm of judicial notice. Not only did the government fail to produce any testimony as to the nature of the seized articles, but no evidence whatsoever was offered as to the manner in which a lottery was conducted and in which such seized articles could be used.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 303

RAYMOND B. FISHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 43-45) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 30, 1953 (R. 46), and a petition for rehearing was denied July 30, 1953 (R. 53). The petition for a writ of certiorari was filed August 28, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether officers who had entered a public shop and from there observed through the open door of a back room activities associated with a numbers game were justified in arresting the participants and conducting a search incident thereto.

2. Whether there was sufficient evidence to show that the slips and books which were seized from petitioner were adapted for use in the operation of a lottery.

STATUTES INVOLVED

The pertinent provisions of 22 District of Columbia Code provide:

> Section 1501. If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery, or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall

be fined upon conviction of each said offense not more than $1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery.

Section 1502. If any person shall within the District have in his possession, knowingly, any ticket, certificate, bill, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for the purpose of playing, carrying on, or conducting any lottery, or the game or device commonly known as policy lottery or policy, he shall be fined upon conviction of each said offense not more than $500 or be imprisoned for not more than six months, or both.

STATEMENT

Following a waiver of jury trial, petitioner was convicted on a two-count indictment returned against him and three others in the United States District Court for the District of Columbia charging the operation of a lottery (count one) and the possession of slips used in a lottery (count two), in violation of 22 D.C. Code 1501 and 1502 (R. 38-39). He was sentenced generally to imprisonment for a

term of from 6 to 18 months (Tr. 71).[1] The judgment was affirmed upon appeal (R. 46).

Prior to trial, petitioner moved to suppress all evidence obtained by the arresting officers, detectives Nunzio Bonacorsi and Wallace K. Valentine of the Metropolitan Police Department, Washington, D. C., on the ground that such evidence had been obtained as a result of an unlawful search and seizure (R. 2, 39). The motion was denied by the court (R. 14) and was renewed unsuccessfully during the trial and at its conclusion (R. 30, 34, 36, 41).

The evidence adduced at the pretrial hearing (R. 2-14) and at the trial (R. 14-38) may be summarized as follows:

Several days prior to February 16, 1951, the date of the arrest, Bonacorsi and Valentine received reliable information that persons personally unknown to them were using premises located at 813 Fourth Street, S.W. as a numbers slips turn-in-station (R. 3-4, 15, 20, 32, 35). Without any search warrants or warrants of arrest (R. 3, 20, 22), the two detectives accompanied by a third colleague went to the premises on February 16 at 1:45 p.m. to investigate the complaint (R. 4, 11, 15-16, 23, 31). At this address, they found a shoeshine and valet shop which they entered. They found themselves in a narrow room about twenty-five feet long. One side of the room was equipped as a shoeshine parlor and the other, as a valet shop. At the rear of the shop

[1] The symbol "Tr." refers to the transcript of the trial proceedings.

was a small back room, which petitioner claimed was a part of his residence. (R. 4, 5, 16, 20, 26.) The passageway from the entrance of the valet shop led directly into the rear room which was separated from the valet shop merely by a door which was "wide open" at the time in question (R. 5, 16). There was no one in the first room but through the open door, the officers observed several persons in the back room (R. 17, 21, 22).

As they approached the back room but before entering, they observed that petitioner was seated at a desk (R. 27), that other persons were seated at a table or standing (R. 17-18, 28), that the desk, table and chairs in that room were covered with what appeared to them to be numbers books and numbers slips (R. 9-10, 17), that "there was some kind of activity going on," (R. 8) and that there were adding machines and telephones in the room (R. 9). The officers entered the room. Bonacorsi noticed that petitioner was sitting at a desk, counting money and sorting slips (R. 29). After ascertaining that the slips were in fact numbers slips by quickly examining some of them (R. 25), Bonacorsi arrested petitioner along with some of the other persons present there (R. 9-10). Petitioner told him then that he operated the valet shop and that none of "these other people had anything to do with it; that all this was all his" (R. 20). After the arrests, the officers seized the following which were used in evidence: (1) numbers slips, which filled two bushel baskets and blank conventional numbers books which were found lying on the tables and

chairs and which filled a box in excess of one cubic foot and (2) some run-down tapes taken from the drawer of the desk (R. 10, 12, 17, 18, 34), at which petitioner had been sitting (R. 10, 12, 17, 18, 34).

At the trial, petitioner introduced no evidence except the following stipulation between the Government and petitioner as to what petitioner's testimony would be (R. 40-41):

> That on February 16, 1951, at the time officers made search of his premises, known as 813 Fourth Street, S.W., he was in control of said premises. That the officers walked through his store and entered a room adjoining said store without his consent, which room was part of his living quarters. That it was not possible for anyone to see any evidence of gaming in said room unless and until he entered said room adjoining his store. That he did not give the officers permission to enter said room, nor did they request permission to do so. That the door to said room was partly open and the seizures made by the officers were on tables which could not be seen from the door, but which could only be seen by the officers after they entered said room.

ARGUMENT

1. Petitioner contends (Pet. 13-18) that the search in this case was not incident to a lawful arrest because, as in *McDonald* v. *United States,* 335 U.S. 451 and *Johnson* v. *United States,* 333 U.S. 10, an illegal entry preceded the arrest. But the entry here was not illegal. It was not effected by force as in *McDonald* nor under color of office as in *Johnson.*

The arresting officers merely entered the door of a public shop just as any other member of the public could legally do under the license implicit in the maintenance of such a public establishment. Although recognizing the existence of such a license extended to the general public, petitioner denied (Pet. 20) that it extended to officers who entered for the purpose of searching. The officers did not, however, enter to search; they entered a public shop to investigate to see what was going on. This was manifestly within their authority as law enforcement officers. Such officers may legally enter without a warrant premises which are open to the general public, regardless of the reason for entry. See *On Lee* v. *United States*, 343 U.S. 747, 751; *Smith* v. *United States*, 105 F. 2d 778 (C.A. D.C.); *Boyer* v. *United States*, 92 F. 2d 857 (C.A. 5); *McWalters* v. *United States*, 6 F. 2d 224 (C.A. 9); *Blanchard* v. *United States*, 40 F. 2d 904 (C.A. 5); *Lawson* v. *United States*, 9 F. 2d 746, 748 (C.A. 7); *Ludwig* v. *United States*, 3 F. 2d 231, 232 (C.A. 7).

After their legal entry into the shop, but before their entry into the back room, the officers saw petitioner engage in some activity in the back room. This activity plus the presence of several telephones, adding machines, money, numerous slips and books, plus the reliable information previously received that a numbers game was being operated at that particular address, clearly constituted reasonable cause for the officers to believe that the persons thus observed were then and there engaged in the commission of an offense. This information

was not secured as the result of a search, it was gained simply by observation from the valet shop [2] after the officers had legally entered it. As this Court said in *McDonald* v. *United States, supra,* at 454, "Looking * * * was not a search, for the eye cannot commit the trespass condemned by the Fourth Amendment." Thus faced with evidence which justified the conclusion that an offense was being committed in their presence, the officers had the right, were in fact as the court below held (R. 45) under a duty, to arrest the persons so engaged.

It is true that before arresting petitioner, Bonacorsi, although he had already seen that a lottery business was being operated, examined some of the slips in order to confirm the conclusion drawn from his earlier observation that the slips were in fact numbers slips. But this was no "search" in the ordinary sense of the word and is clearly distinguishable from a searching out of evidence by hunting through a person's premises. See *Cradle* v. *United States,* 178 F. 2d 962, 963 (C.A. D.C.), certiorari denied, 339 U.S. 929. It is essentially the same as the action of an officer in ascertaining identification before he makes an arrest. Immediately upon ascertaining quickly and definitely the true character of the slips, Bonacorsi arrested petitioner and then made a search of the room and seized the numbers slips and numbers books which

[2] Bonacorsi's testimony was specific and definite that he saw the activity, the various people present, the numbers slips and books and money on the desk and table, the adding machines and the telephones all in the back room—as he entered the doorway of the back room but before entering the room itself (R. 9, 21-22, 26, 27).

were admitted in evidence. This search after a valid arrest was authorized, irrespective of whether the officers could or could not have obtained a search warrant, on the basis of the information which they had before they entered the public shop and observed the offense being committed. *United States* v. *Rabinowitz*, 339 U.S. 56.

2. Petitioner's contention (Pet. 8, 21) that the Government introduced no evidence to show that the numbers slips and numbers books admitted in evidence were adapted for use in the operation of a lottery is frivolous. The arresting officers' testimony that the slips and books found in petitioner's possession were conventional "numbers slips" and "numbers books" (R. 10) clearly established their character as lottery paraphernalia. It is a matter of common knowledge that "numbers slips" are receipts given to participants of numbers games, which itself is known as a game of chance, *e.g.* a lottery. See *Smith* v. *United States*, 105 F. 2d 778, 780 (C.A. D.C.). It is significant that no such claim of insufficiency was made in the trial court and that the contention was advanced for the first time in the court below (See R. 45).

CONCLUSION

The decision below is correct and further review is not warranted. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1953.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953 273613 979